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No. 921

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

WICHITA COCA-COLA BOTTLING COMPANY
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable the Supreme Court of the United States:

The Petitioner, Wichita Coca Cola Bottling Company respectfully shows:

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Wichita Falls Division (R. 16-18) is reported in 61 F. Supp. 407. The opinion of the Circuit Court of Appeals (R. 26-30) is reported in 152 F. (2d) 6.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1945 (R. 31). The jurisdiction of this court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I. Whether the sum of $9,111.40 built up over a period of twenty years by petitioner in a special reserve account designated "Deposit on Cases and Bottles" was taxable as income to petitioner in the various years it was received or was it taxable income in 1940, the year such sum was transferred to surplus from the reserve account?

II. Whether a taxpayer who annually reported a special reserve account designated "Deposits on Cases and Bottles" in its income tax return under the heading of "Liabilities" is estopped to claim that the accumulation of the sum of $9,111.40 in the reserve account over a period of twenty years, and upon which no federal income tax was paid, was not income to it in the year 1940 when such sum was transferred to surplus from the reserve account?

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 22. Gross Income

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out

of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * * * *

STATEMENT

The facts as stipulated (R. 8-16) and as so found by the United States District Court for the Northern District of Texas, Wichita Falls Division (R. 17) are as follows:

The taxpayer, Wichita Coca Cola Bottling Company, is engaged in the business of bottling and distributing Coca Cola and other soft drinks. (R. 9, 11). Since its inception in 1919, it carried a reserve account generally designated as "Deposit on Cases and Bottles." (R. 9.) In selling its product, the company charged the customer $1.30 for the product, the case and the bottles. Of this amount 80c received for the beverage was credited to the sales account and the remaining 50c was credited to the account "Deposit on Cases and Bottles." (R. 10.) The Company made no attempt to demand the return of cases and bottles from dealers or individuals, but when cases and bottles were returned, 50c was paid, for each case with bottles, to the customer or person who brought them in to the company, without regard to whether such person was the original purchaser of the product. (R. 11.)

As a result of the non-return of cases and bottles, the reserve account "Deposit on Cases and Bottles" increased steadily from 1919 until the balance in this

reserve account as of Dec. 31, 1939 amounted to $10,-261.32. (R. 11, 12.) The reserve account was shown in the company's federal income tax return each year and the taxpayer's returns were investigated for all years except the years 1928, 1931, 1932 and 1934. (R. 14.) In the year 1940 an Internal Revenue Agent audited the company's 1937, 1938, and 1939 income tax statements. In that audit, the agent determined that the increase in the size of the credit balance in the reserve account, for each of those years, was income for that particular year and the taxpayer's returns for those three years was corrected to include this increase in income. (R. 13.) The total amount determined by the Revenue Agent as income for those three years was debited from the reserve account after which a balance of $9,111.40 still remained in the account "Deposit on Cases and Bottles" as of December 31, 1939. (R. 13.) Thereafter in the year 1940, the taxpayer debited the account "Deposit on Cases and Bottles" with the entire balance still remaining in this account and credited the same to its surplus account. (R. 14.) The Commissioner determined that the $9,111.40 transferred from the reserve account to the surplus account was taxable as income for the year 1940 and assessed a deficiency which together with accrued interest totaled $2,188.35. (R. 13.) The assessment was paid by the taxpayer and a claim for refund filed within the proper time. The taxpayer's claim for refund was rejected. (R. 14.) The taxpayer filed suit to recover the alleged overpayment and the United States District Court for the Northern District of Texas, Wichita Falls Division, sustained the Commissioner and denied recovery. (R.

18, 19.) The court below affirmed the decision of the United States District Court.

SPECIFICATIONS OF ERROR TO BE URGED

I. The Circuit Court of Appeals erred in holding that the transfer of the item of $9,111.40 from the taxpayer's reserve account to its surplus account in the year 1940 created taxable income to the taxpayer in such amount for the year 1940.

II. The Circuit Court of Appeals erred in holding that the taxpayer was estopped to assert that the inclusion of the item of $9,111.40 in the taxpayer's income for the year 1940 was erroneous.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Northwestern States Portland Cement Company v. Huston*, 126 F. 2d, 196. The difference between the courts stems, first, from varying opinions as to the proper treatment of charges to customers for containers where the amount paid therefor was to be refunded upon the return of the container by the customer to the seller; and secondly, from varying opinions as to the application of the equitable doctrine of estoppel to fact situations that are not distinguishable in principle.

CONCLUSION

The question presented is one of general application and involves a problem of tax administration on which the circuit courts are in conflict. Since confusion will be unavoidable in the light of this conflict until it has been resolved, it is respectfully submitted that this petition should be granted.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said circuit court had in the case numbered and entitled on its docket, No. 11,420, Wichita Coca Cola Bottling Company, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said circuit court be reversed by the court and for such other relief as to the court may seem proper.

February 1946

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